

## COLORADO DEPARTMENT OF HEALTH CARE POLICY & FINANCING

1570 Grant Street, Denver, CO 80203-1818 ◆ (303) 866-2993 ◆ (303) 866-4411 Fax John W. Hickenlooper, Governor ◆ Susan E. Birch MBA, BSN, RN, Executive Director

June 14, 2011

Barbara Edwards, Director
Disabled & Elderly Health Program Group
Center for Medicaid, CHIP and Survey & Certification
Centers for Medicare & Medicaid Services
Attention: CMS-2296-P
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

RE: CMS-2296- P Proposed Rules Medicaid Program; Home and Community-Based Services

(HCBS) Waivers

Dear Ms. Edwards:

I am writing to you on behalf of Colorado's single state Medicaid agency, the Department of Health Care Policy and Financing to provide comment related to proposed rule CMS-2296-P *Home and Community-Based Services (HCBS) Waivers* under section 1915(c) of the Social Security Act.

Colorado appreciates the new flexibilities offered to States by the option to combine the existing three waiver targeting groups, but wishes to ask for clarification on some provisions and to raise concerns about other provisions. In order, Colorado has these specific comments on the proposed regulations:

§441.301(b)(1)(i)(A)(2) Person-Centered Planning Process. Please clarify the criteria against which a State's process will be judged to determine achievement of "necessary support" and "meaningful" role for the individual receiving services to direct the planning process. Colorado views this requirement as a broad value statement, with which it agrees, but has concerns about the unspecified standard against which we will be measured.

§441.301(b)(1)(i)(A)(3) Person-Centered Planning Process. Please clarify whether CMS' expectation is that there will be two separate meeting with the individual, one to assess whether the individual meets the institutional level of care and a second one to conduct the services and supports planning process. Please confirm that a State may require the assessment meeting to be conducted in the individual's home environment to most appropriately consider that individual's functional status in his/her home setting.

§441.301(b)(1)(i)(A)(6) Person-Centered Planning Process. Please clarify whether "services and supports" refers to covered waiver services provided by qualified providers, or whether CMS' expectation is that the State is obligated to include offers of choice for any unpaid services and supports.

§441.301(b)(1)(i)(B)(5) The Person-Centered Plan. Please clarify that the "risk factors" mentioned are those determined in conjunction with the individual's assessment for needed services. Also please clarify the standards against which measures to minimize such risk factors will be judged.

§441.301(b)(1)(i)(B)(6) The Person-Centered Plan. Colorado strongly suggests that the required signatures be limited to the individual clients. Providers may not necessarily agree with the entirety of the plan and requiring all providers to sign the plan in its entirety may delay initiation of service provision. Colorado also believes that sharing the plan in its entirety with all the providers may violate the HIPAA requirements for sharing of the "minimum necessary." Please also clarify if it is CMS' expectation that unpaid service/support providers are also required to sign.

§441.301(b)(1)(i)(B)(7) The Person-Centered Plan. Please consider revising the requirement to assure that the plan is understandable to the individual receiving services or that individual's authorized representative.

§441.301(b)(1)(i)(B)(10) The Person-Centered Plan. Colorado strongly suggests that distribution of the plan in its entirety be limited to the individual clients. Colorado believes that sharing the plan in its entirety with all the providers may violate the HIPAA requirements for sharing of the "minimum necessary." Please also clarify if CMS expects the plan to be distributed to all unpaid caregivers.

§441.301(b)(1)(i)(B)(11) The Person-Centered Plan. Colorado suggests the language be revised to clarify that the requirement is for integration into self-direction where individual budgets are used <u>and</u> the individual has selected a self-directed service delivery option. Not all HCBS programs with individual budgets are also self-directed.

§441.301(b)(1)(i)(B)(12) The Person-Centered Plan. Please clarify the applicability of this assurance regarding preventing unnecessary or inappropriate care to unpaid services/supports. Colorado suggests that the CMS intent may be better articulated as an expectation that there is correspondence between the functional assessment determined needs, the services and supports reflected in the care plan, and the actual utilization of services and supports.

§441.301(b)(1)(iv) Contents of a request for a waiver. Please clarify the apparent conflict between the provisions for excluded settings for home and community based services and the background narrative on pages 21312 and 21313 of the Federal Register notice published April 15, 2011. In the narrative, CMS states that assisted living residences (ALS) are not specifically excluded, yet that possibility is not reflected in the regulatory language to which States will be held accountable. Colorado notes that as currently written, many day programs that specialize in meeting the needs of specific populations (e.g. dementia, traumatic brain injury, intellectual disability) may meet exclusion criteria, as may small group residential programs. Colorado cautions CMS against failing to recognize the far-reaching consequences of completely excluding such settings. To the extent that there are circumstances where the exclusions do not apply, Colorado strongly suggests CMS clarify such non-applicability in the regulatory provisions. At minimum, Colorado recommends that CMS allow for a period of phase out to avoid potentially drastic loss of access to services.

§441.301(b)(6) Contents of a request for a waiver. Please clarify the reporting, cost neutrality, level of care, and waiting list expectations when a State selects the option to combine waiver targeting groups. Will States be expected to report by each individual target group on the CMS 372 (cost neutrality) and CMS 64 (expenditures) reports or will reporting be permitted on the overall waiver? Also please clarify if there would need to be a single institutional level of care (LOC) standard or whether each target group could have a specific LOC standard. Finally, please also clarify if a waiting list, if applicable, would be for the combined waiver or would a waiting list by target group be permitted.

§441.304(e) and (f) Duration, extension, and amendment of waiver. Please clarify the anticipated advance notice timeframe(s) for public notice for HCBS waiver program rates and for the public input process.

§441.304(f)(1) Duration, extension, and amendment of waiver. Please clarify the standard against which a State shall be measured to demonstrate that a public input process is "sufficient," and can CMS provide examples of "meaningful opportunities" for input from individuals served or eligible to be served.

§441.304(f)(2) Duration, extension, and amendment of waiver. Please clarify CMS' expectations for concordance between a State's HCBS waiver approach and a State's state plan amendment (SPA) approach to consultation with Federally recognized tribes. May the same process be used or may there be differences?

§441.304(g)(3)(ii) Duration, extension, and amendment of waiver. Please clarify if the proposed opportunity for hearing when a State disputes intended CMS strategies to ensure compliance will be similar to processes and safeguards specified in 42 CFR §430 Subpart D – Hearings on Conformity of State Medicaid Plans and Practice to Federal Requirements.

## Questions that may not relate to a specific regulatory cite:

• Does CMS contemplate giving States the opportunity to phase-in changes in conjunction with regular waiver approval renewal timeframes or will States be expected to amend existing waivers to comply? If the latter, what kind of phase-in timeframes are contemplated?

Thank you for the opportunity to provide comment and ask for clarification. Should you have any questions, I can be reached at <u>Barbara.prehmus@state.co.us</u> or via telephone at (303) 866-2991.

Sincerely,

Barbara B. Prehmus, M.P.H.

Federal Policy & Rules Officer

Cc: Ms. Susan E. Birch, MBA, BSN, RN, Executive Director

Ms. Lorez Meinhold, Deputy Policy Director, Governor's Office of Policy and Initiatives,

Colorado Governor John W. Hickenlooper

Ms. Cynthia Mann, Center for Medicaid, CHIP, Survey & Certification

